FREE COPY

Office Supreme Court
FILED
JAN 3 1921
JAMES D. MAHER
CLERK

(No. 27163)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 125.

VANDALIA RAILROAD COMPANY, Plaintiff in Error,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, and GEORGE G. GRIFFIN, Composing the Firm of SCHNULL & COMPANY, ET AL., Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

SAMUEL O. PICKENS,
D. P. WILLIAMS,
Attorneys of Record for Plaintiff in Error.

FREDERIC D. McKENNEY,
CHARLES W. MOORES,
R. F. DAVIDSON,
OWEN PICKENS,
Of Counsel for Plaintiff in Error.

James McMillin Printing Company, Penn Ave. and Barbeau St., Pittsburgh, Pa.

(No. 27163)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 125.

VANDALIA RAILROAD COMPANY, Plaintiff in Error,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, and GEORGE G. GRIFFIN, Composing the Firm of SCHNULL & COMPANY, ET AL., Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Supplemental Brief for Plaintiff in Error in Reply to Supplemental Brief for Defendants in Error.

The statement of the case contained in the original brief for Plaintiff in Error fully sets forth the nature of the suit and the pleadings necessary to present the federal question involved, and counsel for Defendants

in Error, on page 1 of the original brief for Defendants in Error, concedes the correctness of the statement of the case in the brief for Plaintiff in Error.

The statement of the case set forth in the supplemental brief for Defendants in Error adds nothing to the statement of the case contained in the brief for Plaintiff in Error. The statement of the case contained in the supplemental brief for Defendants in Error does, however, contain some inaccuracies, most of which are of little importance and have no bearing upon the federal question presented by the record, except the statement appearing on page 4 of such supplemental brief in connection with the attempt of counsel for Defendants in Error to state the effect of the assignments of error in this court, and which statement, in part, reads:

> "(2) That the Supreme Court of Indiana erred in holding upon the record that these rates had not been shown to be confiscatory."

The confiscatory character of the rates prescribed in the order of the Railroad Commission of Indiana dated December 14, 1916, was not in issue on the trial of this cause in the Superior Court of Marion County for the reason that the second paragraph of the answer of Plaintiff in Error which tendered this issue by specially pleading it was demurred to by Defendants in Error for want of sufficient facts to constitute a defense, and this demurrer was sustained.

The assignments of error in this court appear in the printed record on pages 114 and 115 and are directed entirely to the errors committed by the Supreme Court of Indiana in upholding the ruling of the Superior

Court of Marion County, Indiana, in sustaining the demurrer of the Defendants in Error to the second paragraph of answer of Plaintiff in Error by which ruling the Plaintiff in Error, on the trial in the Marion Superior Court, was denied the right and opportunity to introduce evidence to show that the rates prescribed in the order under attack were confiscatory, and no such evidence, of course, was introduced by Plaintiff in Error on the trial in the Marion Superior Court.

The second paragraph of answer of Plaintiff in Error is correctly copied on pages 4 and 5 of the supplemental brief for Defendants in Error and appears also on pages 12 and 13 of the printed record.

The demurrer to this second paragraph of answer, for want of sufficient facts to constitute a defense to the cause of action set forth in the complaint of Defendants in Error, appears on pages 17 and 18 of the printed record, and the ruling of the Superior Court of Marion County sustaining such demurrer together with Plaintiff in Error's exception thereto, appears on page 18 of the printed record, and the opinion of the Supreme Court of the State of Indiana appears on pages 104 to 112, both pages included, of the printed record, and that portion of such opinion dealing with the questions arising on the ruling of the Superior Court of Marion County sustaining such demurrer appears in the printed record beginning at the middle of page 107 and ending at the bottom of page 111.

Brief of the Argument.

I.

In the supplemental brief for Defendants in Error two reasons in addition to the reasons set forth in the original brief for Defendants in Error are urged in support of the decision of the Supreme Court of Indiana sustaining the demurrer to the second paragraph of answer. These additional reasons are:

> "(b) The paragraph is insufficient for the further reason that it states no issue of fact but the mere conclusion of the pleader as to a material fact.
>
> (c) The paragraph is demurrable under the laws of Indiana because it states no defense under those laws."

The first of these reasons was urged in the Supreme Court of Indiana but that court, apparently, did not consider the reasons of sufficient importance to discuss it or pass upon it in its decision and opinion.

This paragraph of answer clearly pleads an ultimate and issuable fact and not a mere conclusion.

Bliss on Code Pleading, Sections 140, 206, 207, 208, 209;
Voiles vs. Beard, 58 Indiana, 510;
Board of Commissioners vs. Hill, 115 Indiana, 316.

If the second paragraph of Plaintiff in Error's answer could possibly be so construed as to plead a conclusion or conclusions instead of issuable facts, that

objection could not be taken by demurrer, under the practice in the State of Indiana, but could only be reached in the trial court by a motion to require the pleader to state the facts necessary to sustain the conclusion alleged. If no such motion be made, all objections to the pleading, on the ground that it states conclusions, are waived. (Acts 1915, Indiana, Chapter 62, page 123.)

In support of the second additional reason to uphold the ruling on the demurrer to the second paragraph of answer, counsel for Defendants in Error quotes in full section 6 of the first and original act creating the Railroad Commission of the State of Indiana, which became effective April 15, 1905. (Acts 1905, Indiana, page 83.)

This section 6 was subsequently, in effect, entirely repealed by the amendment contained in the act in force April 10, 1907. (Acts 1907, Indiana, page 454.)

The point made by counsel for Defendants in Error is that this section specified the routine that was to be followed by the railroad company if it wished to raise the question of the confiscatory nature of the rates specified in the order of December 14, 1906; that such routine was the only routine permitted under the laws of Indiana to raise such question and that there is nothing in the Railroad Commission Act of Indiana permitting a railroad company against which an order has been entered to raise the question of confiscation as a special defense in a suit brought to enforce the application of the rates prescribed in such order.

The further point is made in the supplemental brief for Defendants in Error that, by virtue of the amendment of section 6 of the Act of 1905, by the Act of 1907,

Plaintiff in Error was barred from raising the defense pleaded in paragraph two of its answer after ninety days from February 1, 1907, or, after thirty days from November 18, 1913, and, therefore, such defense was barred on December 13, 1915, the date the answer was filed in the Superior Court of Marion County, Indiana.

The mere statement of these extraordinary propositions contained in the supplemental brief for Defendants in Error would seem to be sufficient to refute them.

It is inconceivable that any lawyer would seriously assert that a state can by legislative enactment deprive any person of the right to claim the protection afforded under the Constitution of the United States.

The second paragraph of Plaintiff in Error's answer asserts a right guaranteed to Plaintiff in Error by section 1 of article 14 of the Constitution of the United States namely, that Plaintiff in Error cannot be deprived of its property without due process of law.

The legislature of the State of Indiana in enacting the Railroad Commission Act of 1905 and the amendatory Act of 1907 could not, even had it desired to do so, deprive the Plaintiff in Error or any other person of the right to claim the protection afforded by section 1 of article 14 of the Constitution of the United States, and, as a matter of fact, the legislature of Indiana in enacting the two acts referred to never intended to attempt to do such a vain thing.

II.

Counsel for Defendants in Error is mistaken in his belief that this case is before this court for alleged error

committed by the Supreme Court of Indiana in interpreting rules of pleading in that state.

No question of any kind was ever raised in the Supreme Court of Indiana with respect to interpreting any of the rules of pleading or practice in the courts of that state, and no such question is presented by the assignments of error in this court.

The error of the Supreme Court of Indiana of which complaint is made is the error in misconstruing the law of the land by virtue of which Plaintiff in Error has been deprived of a right guaranteed to it by the Constitution of the United States.

III.

Counsel for Defendants in Error is also mistaken in believing that the sustaining of the demurrer to second paragraph of answer did not affect adversely the Plaintiff in Error in its case on the general denial.

The present practice act of the State of Indiana has been in force since September 19, 1881. (Acts 1881, Indiana, page 240.)

Section 92 of this Act reads as follows:

"92. The answer shall contain—

FIRST. A denial of each allegation of the complaint controverted by the defendant.

SECOND. A statement of any new matter constituting a defense, counterclaim, or set-off, in plain and concise language.

THIRD. The defendant may set forth in his answer as many grounds of defense, counter-claim,

and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered."

Section 102 of the same Act reads as follows:

"102. All defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially."

Section 127 of the same Act reads as follows:

"127. Under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove."

The complaint in this case proceeds upon the theory that the Railroad Commission of Indiana made a valid order prescribing certain rates and directing the Plaintiff in Error to apply such rates to the particular class of traffic over the particular and limited portion of Plaintiff in Error's railroad specified and described in such order; that the Plaintiff in Error had refused to obey such order and that Defendants in Error, plaintiffs below, were thereby damaged in such manner and to such an extent that they had no adequate remedy at law, and they, therefore, prayed an injunction, mandatory in form, commanding and requiring Plaintiff in Error to obey the order of the Commission.

The issue presented by the first paragraph of Plaintiff in Error's answer, the general denial, was simply an issue controverting the allegations of the complaint, and on the trial of such issue the Plaintiff in Error could properly offer in evidence such evidence only as tended to negative what the Defendants in Error were bound to prove under the allegations in their complaint.

Any new matter which Plaintiff in Error desired to urge as a defense to this complaint had to be pleaded specially by way of answer and had to be set forth in a separate paragraph separately numbered.

Among other new matters which Plaintiff in Error sought to plead as a defense to the case made by the complaint was, and is, that the rates prescribed in that order, if enforced, will produce so little revenue as to be insufficient to reimburse Plaintiff in Error for the handling and carrying of the classes of traffic specified in the order and leave a fair and reasonable return to Plaintiff in Error for performing such service, all in violation of the constitutional guarantee accorded Plaintiff in Error by section 1 of article 14 of the Constitution of the United States.

Plaintiff in Error, following the practice prescribed by the practice act of Indiana, specially pleaded this new matter in paragraph two of its answer. To this paragraph the Superior Court of Marion County erroneously sustained a demurrer for want of sufficient facts, and when the case went to trial the only issue presented by the pleadings was the issue made by the complaint and the mere general denial.

Under section 127 of the Act of September 19, 1881, above quoted Plaintiff in Error could not offer any evidence in support of the allegations of its second paragraph of answer and no such evidence was offered, and the issue tendered by that second paragraph of answer namely, that the rates prescribed were confiscatory and deprived Plaintiff in Error of its property without due process of law, was never tried as an issue of fact.

The excerpts from certain testimony introduced on the trial of the case of *Wood, et al., Plaintiffs in Error, vs. Vandalia Railroad Company, Defendant in Error*, 231 U. S., 1, in the Circuit Court of the United States for the District of Indiana, were introduced in evidence on the trial of this case in the Superior Court of Marion County by the plaintiffs below and were admitted in evidence over the objections of the defendant below. Whatever the purpose of the trial court may have been in admitting this testimony over defendants' objections, such testimony was not admitted on any issue of confiscation for the reason that such issue was not involved on the trial. The objections to such testimony made at the time it was offered appear on page 43 of the printed record.

IV.

What has been said under III above we think sufficiently answers the point sought to be made under IV on pages 10 and 11 of the supplemental brief for Defendants in Error, because it sufficiently appears that this case, in the court below, was not tried upon any evidence offered under any issue of confiscation and that in the Supreme Court of the State of Indiana the cause was neither submitted, considered, nor decided upon a record containing any such evidence or any such issue.

V.

The proposition that this case is *res adjudicata* is not well taken. This proposition is based upon the erroneous assumption that the same issues of fact are presented in this record as were presented by the record

and considered by this court in the case of *Wood et al. vs. Vandalia Railroad Company*, 231 U. S., 1.

In the Wood case, there was clearly presented by the bill of complaint and by the answer of the defendants the issue of the confiscatory character of the rates prescribed in the Commission's order. This was the only issue involved in that case and the evidence of both the complainant and the defendants introduced before the Master, to whom the case was referred, was introduced and admitted upon that single issue.

The complainant in the Wood case adopted a theory to prove the confiscatory character of the rates involved which, at the time, was believed by counsel for complainant to be supported by the principles enunciated in the case of *Smythe vs. Ames*, 169 U. S., 466.

In deciding the Wood case, this court held that the evidence offered by complainant was insufficient to show that the rates were confiscatory, and reversed the decree of the Circuit Court for the District of Indiana and ordered the bill dismissed without prejudice. In the Wood case, this court did not decide that the rates involved were not confiscatory, and all that this court did decide in that case was that the proof by which complainant sought to establish the confiscatory character of such rates was insufficient. In the case at bar, the issue of confiscation has never been tried as an issue of fact because the second paragraph of Plaintiff in Error's answer tendering such issue was held on demurrer to be insufficient. The only issues of fact tried in this case in the Marion Superior Court were the issues formed by the complaint and the answer in general denial, and the issues thus formed, as above pointed out under III, did not and could not embrace the issue of confiscation.

VI.

The proposition sought to be presented under VI on pages 12 and 13 of the supplemental brief for Defendants in Error rests upon the erroneous assumption that the federal question presented by this record arises in connection with a trial in the court below, in which evidence was introduced, and upon the further erroneous assumption that the second paragraph of answer contains allegations of mixed law and fact.

The second paragraph of answer unquestionably pleads matters of fact only and the facts thus pleaded, as above pointed out, are the ultimate issuable facts. If the facts thus pleaded be true, then it follows that Plaintiff in Error will be deprived of its property without due process of law, in violation of the federal constitution. All of this is admitted by the demurrer, which was addressed to this second paragraph of answer.

The allegations in the second paragraph of answer are purely allegations of fact and there is, therefore, not presented any such complicated pleading as was involved in the case of *Reagan vs. Farmers Transportation Trust Company,* 154 U. S., 362, cited on page 12 of the supplemental brief for Defendants in Error, and that case has no bearing whatever upon this case.

VII.

Counsel for Defendants in Error is wrong in his assumption that Plaintiff in Error contends that the case of *Northern Pacific Railroad Company vs. North Dakota, Ex Rel McCue,* 236 U. S., 885, overrules the

case of *Wood, et al. vs. Vandalia Railroad Company*, 231 U. S., 1. Plaintiff in Error does not so contend; but does contend that the two cases are readily distinguishable, and such distinction is clearly pointed out in Mr. Justice Hughes opinion in the *Northern Pacific Railroad Company Case*, in the excerpt from that opinion quoted on page 13 of the supplemental brief for Defendants in Error.

All that was decided in the Wood Case was that the proof adduced to establish the confiscatory character of the rates prescribed in the Commission's order was insufficient, and by the dismissal of the bill without prejudice the parties were left free to further litigate the issue of confiscation, and the company was left free to undertake to prove in some other and proper method the confiscatory character of such rates.

In this case the Plaintiff in Error, at the earliest opportunity presented to it after the filing of the complaint in the Marion Superior Court, and in the only proper and appropriate method prescribed by the rules of practice prevailing in the courts in the State of Indiana, sought to raise as an issue of fact the confiscatory character of the rates involved, and was and is prepared to establish that issue by proper and conclusive proof, but Plaintiff in Error has been deprived of exercising that right—a right guaranteed to it by the Constitution of the United States—because of the erroneous decision of the Supreme Court of the State of Indiana.

VIII.

The eighth proposition, presented on page 13 of the supplemental brief for Defendants in Error, is that this case has now become a moot case. The reasons advanced

in support of such proposition are quite novel and because of their novelty are highly interesting.

However, in determining whether this case has now become a moot case it will be unnecessary to even consider or discuss these novel reasons and, for the purpose of argument, all that is stated in the supplemental brief for Defendants in Error with respect to increased rates and the various provisions of the Transportation Act, 1920 (41 Stat., L., 456), may be taken as true.

At the conclusion of the trial of this case in the Superior Court of Marion County the court found for the plaintiffs (Defendants in Error) and issued the decree prayed for. (Printed record, pages 19 and 20.)

Under the decisions of the Supreme Court of Indiana construing the statutory rules of practice and procedure in that state, an appeal from a decree granting an injunction does not operate as a stay or supersedeas, and the party or parties against whom such decree may have been issued are not absolved, pending the appeal, from obeying such decree. *Central Union Telephone Company et al. vs. Board of Commissioners of Tippecanoe County,* 110 Indiana, 203; 10 North Eeastern Reporter, 922.

Plaintiff in Error sought to have suspended the operation of the mandatory injunction issued by the Superior Court of Marion County by invoking the inherent power of that court as a court of equity over its own decrees, and to that end filed with the court its verified petition praying that court to suspend, pending the final termination of this cause in the Supreme Court of Indiana, or in the Supreme Court of the United States, the operation of the decree and the operation of the injunc-

tion contained in such decree. (Printed record pages 21 to 25, both pages included.)

After considering such petition the Marion Superior Court sustained such petition in part and overruled such petition in part.

The court sustained such petition to the extent of suspending the operation of its decree and injunction for the period of thirty days, upon the terms and conditions set forth in the order appearing on pages 27 and 28 of the printed record.

Among the conditions thus imposed by the Marion Superior Court are the following:

(1) That during such period of suspension the Plaintiff in Error should keep a full, true and complete record and account of all moneys received by it for the transportation of the classes of freight specified in the order of the Railroad Company dated December 14, 1906, and mentioned and described in the decree, which record shall show the point of origin and the point of delivery of each shipment of such freight, the name of the consignor, the name of the consignee, the total amount of money collected and received for transporting each of such shipments, and the amount of money so collected and received in excess of the amount that would have been yielded had Plaintiff in Error transported such classes of freight at and for the rates prescribed in the Commission's order of December 14, 1906, and in and by the decree;

(2) That Plaintiff in Error should, within thirty days after the expiration of such period of suspension, file with the clerk of the Marion Superior Court a full, true and correct report of such record and account;

(3) That in the event it shall be held upon final determination of this cause in the court of last resort that said order of the Railroad Commission of Indiana, dated December 14, 1906, is legal and valid, or the rates in such order prescribed and in the decree specified, are legal and valid, Plaintiff in Error shall, within thirty days after the date of such final determination, pay to the clerk of the Marion Superior Court, for distribution upon the order of that court among the persons lawfully entitled to receive the same, such sum of money as shall be equal to the amount of money Defendants in Error collected for the transportation of such shipments during the period of suspension of the decree in excess of the amount Plaintiff in Error would have received during such period had Plaintiff in Error transported such shipments at the rates prescribed in the Commission's order and in the decree;

(4) That Plaintiff in Error shall pay to Defendants in Error such legal damages, if any, which Defendants in Error may be lawfully entitled to recover sustained by them by reason of the suspension of such decree and of Plaintiff in Error continuing during such period of suspension the acts enjoined by such decree.

The Plaintiff in Error was further required by the order of the court to file a bond in the penal sum of $15,000 with the Guaranty Company of North America, as surety, obligating Plaintiff in Error to fully perform all the conditions prescribed in the court's order suspending the operation of the injunction for said period of thirty days. Such bond was filed and approved by the court and appears in the printed record on pages 33 to 36, both pages included.

The order suspending such decree was entered December 23, 1916, and upon the expiration of thirty days

thereafter Plaintiff in Error put into effect the rates prescribed in the decree of the court and in the order of the Railroad Commission in the manner and to the extent prescribed in the decree and in the order.

At twelve o'clock noon, December 28, 1917, the President of the United States, acting under the authority conferred upon him by the Congress, assumed the possession, control and operation of various transportation systems, including the entire transportation system of Plaintiff in Error.

On June 28, 1918, General Order No. 25 advancing freight rates, issued by the Director General of Railroads, theretofore appointed by the President, became effective.

The rates prescribed in the decree of the Marion Superior Court remained in effect from and after the expiration of the thirty-day period, during which such decree was suspended, continuously until June 25, 1918. During the period that the operation of the decree was suspended Plaintiff in Error kept the account and record prescribed in the order suspending such decree, and, thereafter, as prescribed in such order, filed a report thereof with the clerk of the Marion Superior Court.

There is now in the custody and possession of Plaintiff in Error a large sum of money amounting to many thousands of dollars and representing the difference between the revenue received for transporting the shipments of classified freight between Indianapolis, Indiana, and the Illinois-Indiana state line and intermediate stations, at the rates charged therefor and the amount of revenue Plaintiff in Error would have received from transporting such shipments at the rates prescribed in

the decree during the said thirty-day period such decree was suspended.

Under the conditions prescribed in the order suspending the decree, this sum must be retained by Plaintiff in Error until the final determination of this case, and then, in the event it shall be held upon such final determination that the rates prescribed in the Commission's order and in the decree are legal and valid, Plaintiff in Error must, within thirty days thereafter, pay to the clerk of the Marion Superior Court such sum for distribution upon the order of the court among the persons lawfully entitled to receive it.

It is, therefore, obvious that the title to this large fund and its ultimate distribution rest entirely and solely upon the validity and legality of the decree of the Marion Superior Court and the legality and validity of the order of the Railroad Commission of Indiana, upon which such decree is predicated; and upon the authority of the decision of this court in the case of *Grocsbeck et al. vs. Duluth S. S. & A. Ry. Co.*, decided November 10, 1919, and reported in 250 U. S., 607, Plaintiff in Error contends and earnestly insists that this case has not become moot; but, on the contrary, the federal question presented by this record must of necessity be ultimately finally determined in order that a proper and legal disposition may be made of the fund now in the custody and possession of Plaintiff in Error, and which it must hold until this cause is ultimately finally determined.

On page 18 of the supplemental brief for Defendants in Error an effort is made to distinguish the case at bar from *Grocsbeck vs. Duluth S. S. & A. Ry. Co.* on two grounds, namely, (1) that since the decision in

that case the Interstate Commerce Act has been amended by the Transportation Act, 1920; and, (2) in that the rate involved in the Groesback case "was prescribed by statute and no routine was provided for review in the state courts of its confiscatory nature."

The Transportation Act, 1920, amending the Interstate Commerce Act, does not in any way purport to nullify judgments and decrees of state or federal courts, and that act cannot, of course, have any effect upon the decision of the Supreme Court of Indiana upholding the decree of the Marion Superior Court, nor upon the power and authority of the Supreme Court of the United States to afford persons relief from any attempt to deprive them of rights guaranteed them by the Constitution of the United States.

In legal contemplation there is no distinction between a rate prescribed by statute and a rate prescribed by an order of a Commission created by the legislature.

IX.

The only federal question presented in this case arises by virtue of the ruling of the Superior Court of Marion sustaining the demurrer to the second paragraph of answer of Plaintiff in Error, by which Plaintiff in Error seeks to assert a right given it by the Constitution of the United States, and by the decision of the Supreme Court of Indiana affirming the ruling of the Marion Superior Court. By such ruling and decision Plaintiff in Error has been deprived, and will be deprived, of the protection afforded by section 1 of article 14 of the Constitution of the United States unless Plain-

tiff in Error can invoke the jurisdiction, the power and authority of the Supreme Court of the United States, and Plaintiff in Error seeks to do this by the writ of error issued out of the Supreme Court of the United States to the Supreme Court of the State of Indiana to review the error of that court by which Plaintiff in Error was deprived of this right vouchsafed it by the Constitution of the United States.

Plaintiff in Error earnestly but respectfully insists that it is entitled to have the opportunity which it sought in the Superior Court of Marion County, to establish by legal and competent evidence the confiscatory character of the rates which it is commanded to put into effect by the decree of that court, and that the Supreme Court of Indiana erred to the manifest detriment and injury of Plaintiff in Error by affirming the ruling of the Marion Superior Court sustaining the demurrer to the second paragraph of Plaintiff in Error's answer.

Respectfully submitted,

SAMUEL O. PICKENS,
D. P. WILLIAMS,
Attorneys of Record for Plaintiff in Error.

FREDERIC D. MCKENNEY,
CHARLES W. MOORES,
R. F. DAVIDSON,
OWEN PICKENS,
Of Counsel for Plaintiff in Error.